(1) Supreme Court, U.S.
FILED

NO. 94 2010 MAY 3 - 1995

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Gerald J. Brown, Sr.,

Petitioner

VS.

Maintenance & Industrial Services, Inc.;
Wes Nichols, Human Resources Manager;
Terry Coleman, Supervisor E. & I. Shop;
Fluor Daniel, Inc.; Michael Wright;
Fluor Corp. Inc.; V. L. Kontny, President,;
Fluor Corporation, Inc.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Gerald J. Brown, Sr.
913 - Lawrence Ave.
Nashville, Tn. 37204
(615)383-5206
Gerald J. Brown, Sr., ProSe

5 cop

QUESTIONS PRESENTED FOR REVIEW

1. The 1964 Civil Rights Acts(Amended) and the United States Constitutional rights prohibiting the respondents' disparate standard treatment of the petitioner's (Black Male) illegal termination of employment and forefeiture of $27,000.00 wages for allegedly observed asleep(never proven) for two(2) minutes at work-bench versus the respondents' standard treatment of a (White Male's) employment not being terminated and his only loss of $650.00 wages for sleeping sixty(60) minutes in two(2) chairs (while being observed by two(2) supervisors),;

2. The respondents' failure to employ and promote a diverse mix of people due to the respondents' subliminal racial prejudice practices and procedures covertly continued, which is prohibited by the 1964 Civil Rights Acts(Amended) and the United States Constitutional rights of "equal treatment under the laws" and the rights to "due process" in

application of the laws?;

3. Whether an employee who is dismissed in violation of the National Labor Relations Acts is barred from obtaining any remedy if, solely as a result of the unlawful dismissal and the litigation challenging it, the employer falsefies another basis for dismissal, a question previously accepted for review by the Court in Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), cert. granted, __ U.S.__, 125 L. Ed. 2d 686, cert. dismissed, 125 L. Ed. 2d 773 (1993) and Christine McKennon v. Nashville Banner Publishing Co., (95-1543), United States Supreme Court Case, Decision January 23, 1995., Writ of Cert.

TABLE OF CONTENTS

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Page(s)

QUESTIONS PRESENTED.....i - ii

TABLE OF AUTHORITIES CITED/CASES..... iv

STATUTES..... v

INDEX TO APPENDICES..... vi

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....3 - 4

STATEMENT OF THE CASE.....4 - 9

REASON FOR GRANTING THE WRIT.....10 - 15

THIS CASE RAISES IMPORTANT ISSUE/ ISSUES REGARDING THE INTERPRETATION OF THE ANTI-DISCRIMINATION IN EMPLOYMENT STATUTES CONCERNING WHICH THERE IS A CONFLICT BETWEEN THE APPEALS COURT CIRCUITS..... 10

CONCLUSION..... 15

APPENDIX ON DECISIONS BELOW

TABLE OF AUTHORITIES/CASES

CASES: Page(s)

Kristufek v. Hussmen Foodservice Co.,
985 F.2d 364 (7th Cir. 1993).... 13

McKennon v. Nashville Banner
Publishing Co.,
U.S. Supreme Court #95-1543
Decision on 3-23-1995.....10, 11, 13

Milligan-Jensen v. Michigan
Technological Univ.,
975 F.2d 302(6th Cir. 1992), cert. granted
__U.S.__, 125 L. Ed. 2d 686 cert.
dismissed, 125 L. Ed. 2d 773 (1993),
.....10, 11, 13

National Labor Relations Board Case
FMCS No. 93-11153 ARBITRATION CASE BETWEEN:
Maintenance & Industrial Services, Inc.,
v.
United Rubber Workers Union #1055... 7 - 8

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989).....12, 14

Summers v. State Farm Insurance
864 F.2d 700 (10th Cir. 1988)..... 11

Wallace v. Dunn Construction Co.
968 F.2d 1174 (11th Cir. 1992)..... 12

STATUTES: PAGE(S)

28 U.S.C. Sec. 1254(1)..... 4 - 5

28 U.S.C. Sec. 1343(4)..... 4 - 5

29 U.S.C. Sec. 143..... 3, 5

29 U.S.C. Sec. 621..... 3, 5

29 U.S.C. Sec. 623..... 3, 5

42 U.S.C. Sec. 1981, 1983..... 4 - 5

Tennessee Human Rights Act,
Tennessee Code Ann.,
Sec. 4-21-101, et.seq. .....4 - 5

United States Constitution
Seventh Amendment.....4, 8, 9
Rights in Civil Cases
United States Constitution
Fourteenth Amendment
Civil Rights.....4, 8, 9

APPENDIX A - Order of The Court of Appeals
for the Sixth Circuit:
February 9, 1995

APPENDIX B - Order of The Court of Appeals
for the Sixth Circuit:
MANDATE for Costs Award
March 20, 1995

APPENDIX C - Denial of the Petition for
EnBanc Hearing
(Sixth Circuit Date-Stamp wrong)

APPENDIX D - Order of the District Court for
the Middle District of Tennessee
January 18,1994

APPENDIX E - AMENDMENT #7 to the
UNITED STATES CONSTITUTION

APPENDIX F - AMENDMENT#14 to the
UNITED STATES CONSTITUTION

APPENDIX G - National Labor Relations Board
Arbitration CASE No.
FMCS No. 93-11153:
Maintenance & Industrial Ser.,Inc.,
v.
United Rubber Workers Union #1055
Decision dated August 9, 1993

APPENDIX H - U.S.C. Title 42 - Sec. 1981,
Equal rights Under the Law

Appendix I - U.S.C. Title 42 - Sec. 1983
Civil Actions for Deprivation
of rights

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Gerald J. Brown, Sr.,

Petitioner

VS.

Maintenance & Industrial Services, Inc.;
Wes Nichols, Human Resources Manager;
Terry Coleman, Supervisor E. & I. Shop;
Fluor Daniel, Inc.; Michael Wright;
Fluor Corp. Inc.; V. L. Kontny, President,;
Fluor Corporation, Inc.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gerald J. Brown, Sr., respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 09, 1995; March 20, 1995; June 16, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Gerald J. Brown, Sr., VS Maintenance & Industrial Services, Inc., ETC. AL., Case #94-5353, Order dated February 9, 1995, and appears in Appendix A to this petition. The Court of Appeals Denial of the Petition for Hearing EnBanc appears in Appendix C to this petition. The Order of the District Court for the Middle District of Tennessee appears in Appendix D to this petition.

JURISDICTION

The decision of the Court of Appeals for the Sixth Circuit was entered on February 09, 1995,; A petition for Hearing EnBanc was filed on March 02, 1995, and denied shortly thereafter. Jurisdiction of this Court is invoked under 28 U.S.C.,Sect. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C., Sec. 621, et., which provides in pertinent part as follows:

Sec. 623. Prohibition of Age Discrimination

(a) Employer practices: It shall be unlawful for an employer; (1). To fail to refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee or order to comply with this (Act).

This case involves the 1964 Civil Rights Acts(Amemded); Title 28,U.S.C., Sec. 1343(4); Title 42,U.S.C., Sec. 2000e-5(f); Title 42, U.S.C., Chpt.21, Sec. 1981 and 1983 - The 1866 Civil Rights Act (May 31, 1879, Chpt. 114, Sec. 16.16 Stat. 144), deprivation of rights; Tenn. Code Ann. Sec. 50 - 3 -101,et; Tenn. Code Anna. Sec.4 - 31-101, et seq.

This case involves the United States Constitution Amendments #7 - Rights in Civil Cases and Amendent # 14 - Civil Rights (Appendix E and F to this petition).

STATEMENT OF THE CASE

This action was filed by the petitioner, Gerald J. Brown, Sr., ProSe, in the United States District Court for the Middle District of Tennessee on November 19, 1993, with "jury demand", "jury trial requested" stipulations plainly typed on the original complaint filed at time of filing.

The complaint alleges that Gerald J. Brown, Sr., was discharged from his employment

because of his race, age, and religion, in violation of the 1964 Civil Rights Acts (Amended), Labor Management Relations Act, 29 U.S.C. Sect. 143, et. seq., The Age Discrimination in Employment Act, 29 U.S.C., Sec. 621, 623; Tennessee Human Rights Act; Tenn. Code Annt., Sec. 4-21-101, et.seq.; Civil Rights Act, 42 U.S.C. 1983 and 1981, May 31, 1870, Chpt. 114, Sec. 16.16, Stat. 144., et.seq.

The defendants-appellees, Maintenance & Industrial Services, Inc., Respondent here, filed motion to dismiss in a summary motion. The District Court granted the motion, ignoring the petitioner's demand for a jury trial because of all of the different facets of the case. Petitioner was precluded from any recovery. The District Court dismissed the case with prejudice. The Court rejected the petition of the petitioner's arguments that he should have a jury trial to show and prove that he was not asleep at work-

bench or did no type of misconduct as to justify his employment termination.

The defendants-appellees(respondents) Terry Coleman and Wes Nichols conspired to find an excuse to terminate the petitioner's employment after the petitioner had objected to a illegal(mass-wholesale transfer) shifting of many employees about without regards to the employees seniority. The petitioner filed a union grievance on Monday , November 16, 1992, verbally with supervisor Terry Coleman. Terry Coleman failed to follow the correct procedure and write-up the first step. The petitioner then filed a written grievance form with a union steward. Differences arose over the filing and timing of the forms, supervisor Coleman's timing and dating of the forms.

On Friday, November 20, 1992, supervisor Terry Coleman went to Human Resources Manager Wes Nichols and alleged that he(Coleman) had observed the petitioner(Brown) asleep at

petitioner's work-bench for two(2) minutes and that as the electronic/instrumentation shop supervisor he(Coleman) wanted Wes Nichols to terminate the petitioner's employment immediately. Wes Nichols told the petitioner(Brown) that he was terminated immediately as an employee and the petitioner was not afforded a hearing or rebuttal to respondent(Coleman's) charge allegeding being asleep, in an area of work space that was in violation of OSHA Clean-Air/Safe Air work space. Tennessee OSHA issued a citation against the respondents at a later date for failing to provide work-benches and areas with adequate fume and smoke removal apparatus in the electronic/instrumentation shop at work-benches and having an improper heating-ventilation system for the whole area.

After a nine-month(9) delay of waiting on the arbitration process(Appendix G to this petition, Arbitration Decision Case No. FMCS 93-11153, August 9, 1993), the petitioner was

re-instated to his former position, referred to as a "possum" by the arbitrator, had not been proven to be asleep, but ordered to forfeit allmost $27,000.00 in lost wages by the arbitrator.

Petitioner's lawsuit/civil action in District Court was to try to reclaim loss wages, etc. Case never got a day in Court. On Appeal, the Sixth Circuit affirmed the District Court, rejecting arguments that it is not legally allright for the respondents' to violate petitioner's civil rights of due process, (2) petitioner's rights under the Collective Bargaining Agreement were ignored; (3) that the arbitrator made "racist" comments in his decision and may be "linked" TO (through Name ties/familiar same surnames as defendant-appellee(respondents') Human Resources Manager Joel Odom in Greenville, South Carolina home office for respondents' home office; respondents made special effort to get the arbitrator James J. Odom, Jr.,

during the selection process; the arbitrator erred or purposely denied the petitioner's back pay, whereas in two(2) other arbitrated cases the grievants were awarded their full back-wages; there was insufficient evidence for the District Court's dismissal Order; petitioner could not get the NLRB to censor or review the case or the arbitrator because there was not an appointed-yet Secretary of Labor by the President of the United States in Washington, D.C.; statistical evidence submitted by the petitioner was ignored, the evidence plainly showed that respondent Maintenance & Industrial Services, Inc. treated the minority employees in a discriminatory manner with regards to the hiring practices, policies and promotions because their organization was devoid of any minority office, clerical, supervisory or management persons or personnel.

REASONS FOR GRANTING THE WRIT

This case raises an important issue regarding the interpretation of the Anti-discrimination in Employment Statutes concerning which there is a conflict between the Appeals Courts Circuits.

This case presents precisely the same issue on which this Court granted certiorari in the case of Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), cert. granted,__U.S.__, 125 L. Ed. 2d 686, cert. dismissed, 125 L. Ed. 2d 773(1993). Certiorari was dismissed in the case solely because the parties reached a settlement.

The issue presented in Milligan-Jensen v. Michigan Technological Univ. and the case Christine McKennon v. Nashville Banner Publishing Co., U.S. Supreme Court Case No. 95-1543, January 23, 1995, (date Of decision). The issues presented in Milligan-Jensen v. Michigan Technological Univ., and McKennon v.

Nashville Banner Publishing Co. remains a recurrent and vitally important question about which the Courts Circuits are irreconcilably in conflict.

The "after-acquired evidence" doctrine deals with evidence that the employer discovers after the challenged employment decision was made, and which the employer alleges would (if known) provide a non-discriminatory basis for adverse employment action. The evidence is usually, as in the McKennon case and this case, discovered only as a direct result of the filing of a claim of employment discrimination.

The Sixth and Tenth Circuits have held that after-acquired evidence is a basis for absolving an employer of any liability for discrimination and discriminatory practices. Summers v. State Farm, 864 F.2d 700(10th Cir. 1988); Milligan-Jensen v. Michigan Technological Univ., (975 F.2d at 304-05., McKennon and the present case applies the Sixth Circuit's "after-acquired evidence" doctrine to an action

brought under the ADEA.

The Eleventh Circuit, on the other hand, has held that an employer is liable under the same circumstances. Wallace v. Dunn Construction Co., 968 F.2d 1174(11th Cir. 1992). Wallace expressly rejected the reasoning of the Tenth Circuit and held that an employer may escape a finding of liability only by showing that it had relied on a non-discriminatory reason at the time of employment decision, citing Price Waterhouse v. Hopkins, 490 U.S. 228(1989)., 968 F.2d at 1180-81. Thus "after acquired evidence" cannot defeat liability, but may limit the relief available in that reinstatement may be precluded and backpay available only to the date that the employer demonstrates that the new evidence would have been discovered in the abscence of the litigation.

The Seventh Circuit has taken a third and intermediate position on the issue. Thus, newly discovered evidence that shows that the

employee had made misrepresentations on his or her employment application will not defeat liability unless the misrepresentation is related to a critical job element. Further, in the Seventh Circuit backpay is cut off as of the date after acquired evidence was in fact discovered. Kristufek v. Hussmenn Food Service Company, 985 F.2d 364, 369-70 (7th Cir. 1993).

As the United States and the Equal Employment Opportunity Commission pointed out in their brief as amici curiae in support of the grant of certiorari in Milligan-Jensen, there has been a proliferation of cases "in which employers offer "after-acquired evidence" to defend their discriminatory actions" and that the defense has "broadly destructive impact... on non-discrimination goals". Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae in No. 92-1214, p.11, citing, inter alia, the McKennon case

and the present case as one of "Many cases in which the "after acquired evidence" defense has been raised.

The petitioner urges that the approach of the Eleventh Circuit is correct and should be adopted by this Court. "After-acquired evidence" cannot absolve an employer of discriminatory action, allthough it may affect the remedy to be granted the employee. This rule would be consistent with the decision of this Court in Price Waterhouse v. Hopkins, supra, and with section 107 of the Civil Rights Act of 1991, which provides that if a reason for an employment decision violates Title VII, then there is liability under the statute; only the remedy is affected if there is another, legal reason for the action. As the United States has pointed out, the "after acquired evidence" doctrine of the Sixth and Tenth Circuits, as applied in this case, is an unwarranted obstruction to proper and effective

enforcement of the non-discrimination requirements of civil rights statutes, and should be rejected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Sixth Circuit reversed.

Respectfully submitted,

Gerald J. Brown, Sr., ProSe

Gerald J. Brown, Sr.,ProSe

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913 - Lawrence Ave.
Nashville, Tn. 37204
(615) 383-5206

No.94-5353

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gerald J. Brown,Sr., Plaintiff-Appellant	
v.	ORDER
MAINTENANCE & INDUSTRIAL SERVICES, INC.; WES NICHOLS, Human Resources Manager; TERRY COLEMAN,Supervisor E & I Shop; FLUOR DANIEL, INC.; MICHAEL WRIGHT;FLUOR CORP., INC;V. L. KONTNY,President, Fluor Corporation, Inc., Defendants-Appellees	FILED Feb.09,1995

Before:MERRITT,Chief Judge;
BROWN and BATCHELDER, Circuit Judges

Gerald J. Brown, Sr., pro se, appeals a district court order granting the defendants' motion to dismiss for failure to state a claim under Fed. R. Civ. T. 12(b)(6). The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argu-

ment is not needed. Fed. R.App.P.34(a).

Brown sued his employer, Maintenance & Industrial Services, Inc. (MISI), and several management personnel within that company, alleging that he was a victim of discrimination based on race, age and religion, when he was terminated on November 20, 1992. On that day, Brown's supervisor and the MISI human resources manager observed Brown asleep at his work place and immediately terminated Brown from employment. Brown filed a grievance, and an arbitrator eventually reinstated Brown without backpay. Brown alleged that the defendants violated his rights under the Labor Management Relations Act (LMRA), 29 U.S.C. §!$#,ET SEQ., and his rights under numerous other federal statutes. Brown also alleged that he is entitled to damages under 42 U.S.C.§ 1983, and under Title VII of the Civil Rights Act, 42 U.S.C. §2000e,et. seq.

Upon consideration of the defendants'

motion to dismiss, the district court determined that Brown failed to establish a prima facie case of discriminatory termination under Title VII and failed to show causes of action under the Fourth and Fourteenth Amendents; under 42 U.S.C. §§ 1983 and 1988; under 45 U.S.C. §§ 36,43 and 54; or under Tenn. Code Ann. § 50-3-101,et seq. On appeal, Brown raises the following issues: (1) the district court's decision, in effect, held that it is "legally allright for defendants Coleman and Nichols to violate his civil rights of due process"; (2) his rights under the Collective Bargaining Agreement were"ignored";(3) the arbitrator's decision is evidence that the defendants' act constituted a "wrongful and illegal termination"; (4) the arbitrator made "racist" comments in his decision; (5) the arbitrator erred by denying him back pay; (6) there was insufficient evidence to support the district court's findings; (7)Brown

exhausted his administrative remedies; (8) Brown was wrongly denied a jury trial; and (9) statistical evidence Brown submitted shows that MISI treats employees in a discriminatory manner with regard to hiring practices and policies.

Whether the district court correctly dismissed the suit pursuant to Fed.R. Civ. P. 12(b)(6) is a question of law subject to de novo review. Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291,296(6th Cir. 1993). The court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtely can prove no set facts in support of his claims that would entitle him to relief. Allard v. Weitzman(In re DeLorean Motor Co.),991 F.2d1236, 1239-40 (6th Cir. 1993).

The district court properly held that Brown failed to establish a prima facie case

of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Moreover, MISI produced sufficient evidence to show that the company took action against Brown for a legitimate, nondiscriminatory reason, rebutting any presumption of discrimination. Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Brown cannot establish a prima facie case by his statistical evidence allegedly showing,without more, racial imbalance in one segment of an employer's work force. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989). Brown's allegations of conspiracy and his general attack on the company's policies in regard to minorities are mere conclusory allegations not sufficient to withstand the defendants' motion to dismiss. See McDonald v. Union Camp Corp, 898 F.2d 1155,1162 (6th Cir. 1990). The plaintiff's claims must also fail under 42 U.S.C. §1983, because none of the defend-

ants were acting "under color of state law". Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1983); Simescu v. Emmet County Dept of Social Servs., 942 F.2d 372,374 (6th Cir. 1991).

The district court applied the proper standard to dismiss the claim under Fed. R. Civ. P.12(b)(6). Further, no jury trial is necessary when the matter may be dismissed on the pleadings. The other claims that Brown initially presented in district court have been abandoned. Thus, this court need not address those issues on appeal. Boyd v. Ford Motor Co., 948 F.2d 283,284 (6th Cir. 1991), cert. denied, 112 S. Ct. 1481 (1992).

In their brief, the defendants argue that this appeal is frivolous, and the defendants request attorneys' fees and costs. However, recently amended Fed. R. App.P. 38 requires that a party alleging that an appeal is frivolous must file a separate motion for

attorneys' fees and costs. Therefore, the request is denied.

Accordingly, the district court's order dismissing this claim is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

"s/ Leonard Green "

Clerk

Case No. 94-5353

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

GERALD J. BROWN, SR.
Plaintiff-Appellant

V.

MAINTENANCE & INDUSTRIAL SERVICES, INC., ET. AL.,
Defendants-Appellees

Before: MERRITT, Chief Judge;
BROWN and BATCHELDER, Circuit Judges

Upon consideration of the appellee's motion for damages and costs from the appellant,

It is ORDERED that the motion for double costs be and it hereby is GRANTED. It is further ORDERED that the motion for attorney's fees be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

"s/ Leonard Green," Clerk
FILED MAR. 20, 1995

No. 94-5353

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gerald J. Brown,Sr.
Plaintiff-Appellant

V.

Filed:
March 20,1995

MAINTENANCE & INDUSTRIAL SERVICES, INC.; WES NICHOLS, Human Resources Manager; TERRY COLEMAN,Supervisor E & I Shop;FLUOR DANIEL, INC.; MICHAEL WRIGHT;FLUOR CORP., INC.; V. L. KONTNY,President, Fluor Corporation, Inc.,
Defendants-Appellees

MANDATE

Pursuant to the court's disposition that was filed 2/9/95 the mandate for this case hereby issues today.

COSTS: $125.00

Filing Fee.....$
Printing.....$
Total.....$

A True Copy

Attest:

"s/ Patricia Elder "
Deputy Clerk

No. 94-5353

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gerald J. Brown, Sr., Plaintiff-Appellant,	)	Filed
	)	June 16, 1994
V.	)	
MAINTENANCE & INDUSTRIAL SERVICES, INC.,ET AL., Defendants-Appellees	)	ORDER

The court having received a petition for hearing en banc, and the petition having been circulated to all active judges of this court, and no judge of this court having favored the suggestion,

It is **ORDERED** that the petition be and hereby is denied.

ENTERED BY ORDER OF THE COURT

"s/ Leonard Green "
Leonard Green, Clerk

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GERALD J. BROWN, SR.	)	
	)	No. 3:93-0959
VS.	)	
	)	
MAINTENANCE & INDUSTRIAL SERVICES, INC., et al.	)	
	)	

ORDER

Pending before the Court is Defendants Maintenance & Industrial Services, Inc., et al. ["Defendants"]'s Motion To Dismiss (Doc. No. 4), to which Plaintiff has filed a Response (Doc. No. 5) on December 27,1993.

Consistent with the contemporaneously-filed Memorandum, the Court hereby GRANTS Defendats' Motion To Dismiss. Accordingly, the Court ORDERS that this action be DISMISSED with prejudice.

Entered this the 18th day of January, 1994.

"s/ John T. Nixon "
John T. Nixon, Chief Judge
UNITED STATES DISTRICT COURT

This document was entered on the docket in compliance with Rule 58 and /or Rule 79(a) FRCP, ON 1/25/94 by DEB

Appendix D

AMENDMENT 7 TO THE UNITED STATES CONSTITUTION

RIGHTS IN CIVIL CASES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

AMENDMENT 14 TO THE UNITED STATES CONSTITUTION

CIVIL RIGHTS

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE MATTER OF THE ARBITRATION

BETWEEN

MAINTENANCE AND INDUSTRIAL SERVICES,INC.
(Company)

and

UNITED RUBBER, CORK, LINOLEUM & PLASTIC
WORKERS OF AMERICA,AFL-CIO,CLC,
LOCAL 1055
(UNION)

FMCS NO. 93-11153

The hearing was held on June 25,1993, at the Holiday Inn, I-24 East, 350 Harding Place, Nashville, Tennessee, before James J. Odom, Jr., Arbitrator.

APPEARANCES

FOR THE COMPANY: Richard R. Parker,Esq.
Grace N. Burdette, Esq.
Ogletree, Deakins, Nash,
Smoak & Stewart
St. Cloud Corner
500 Church St., Fifth Fl.
Nashville, Tn. 37219

FOR THE UNION: Mr. Tommy R. Powell
President
URW, Local 1055
Post Office Box 86
LaVergne, Tn. 37086

PERTINENT CONTRACT PROVISIONS

ARTICLE III

NO DISCRIMINATION

There shall be no discrimination on the basis of race, color, religion, sex, national origin, age, handicap, status as a veteran, membership or non-membership in the Union, or other legally protected activity or status.

ARTICLE V

MAMAGEMENT RIGHTS

SECTION 1. The company retains all rights and authority not expressly excluded or limited by this Agreement including, but not limited to, the right to... adopt and enforce reasonable work rules, safety rules and security requirements; and to discipline, suspend or discharge employees for cause.

ARTICLE XXI

ARBITRATION

SECTION 4. The arbitrator shall issue a decision within thirty(30) days of the

hearing which shall be final and binding on both parties provided, however, that the arbitrator shall not have the authority to alter or amend the provisions of the Agreement in any way.

ARTICLE XXV

UNDERSTANDING

This Agreement represents the complete understanding of the parties and embodies the entire Agreement between the Company and the Union.

PERTINENT PROVISIONS OF THE JOB RULES AND CONDUCT

Employees are expected to conduct themselves in a courteous and businesslike manner at all times. Rules of conduct are necessary for efficient and safe operations. Work rules will be fairly and consistently enforced. If you have questions about any of these rules, you should discuss them with your immediate supervisor to ensure your complete understanding. These work

rules are not intended to be all encompassing, and do not address every conduct problem which may occur or may be cause for discipline; however they do convey to employees the type of conduct which will be tolerated. Work rules may be altered and /or changed from time to time as deemed appropriate. The misuse, abuse, or nonadherence to any of these rules and other generally accepted rules of conduct will result in disciplinary action which may include termination.

It is the policy of this company to be fair and consistent in the treatment of all employees. We expect each employee to respect the rights of co-workers, Bridgestone employees, contractor personnel, visitors and the property of others.

BACKGROUND AND POSITIONS OF THE PARTIES

The Company is the on-site maintenance contractor for Bridgestone(USA), Inc. at its tire production facility in LaVergne, Tennessee, with the responsibility of

keeping the Bridgestone equipment serviced, repaired and running smoothly. It employs approximately 200 hourly personnel. At the time of his termination for sleeping on the job, grievant Gerald J. Brown, a maintenance mechanic, was assigned to a job calibrating time clocks.

Company Position. The grievant was properly terminated for sleeping on the job. The prohibition against sleeping, universal in industry, is a rule that is especially necessary for workers in the Bridgestone plant because of risks of exposure to electrical shock. Discharge as a penalty is also nearly universal, in recognition of the seriousness of the offense. There is no question that the grievant was sleeping at his work bench. He was observed asleep not only by a supervisor, but also by a bargaining unit member, the work group's lead man. The two men observed Brown with his head down and his hands in

his lap for a period of several minutes. "Yeah, he's sleeping", the lead man confirmed when he was called to Brown's work bench by the supervisor, and Brown continued to sleep until awakened by another employee coming in off the floor.

There is a strict policy against sleeping, a policy that has been enforced consistently and punished uniformly each time by termination of the offender. The Company has no provision for a suspension or any lesser penalty.

Union Position. The Company's action is subject to a number of defenses. First, the supervisor was mistaken in his determination that the grievant had fallen asleep at his work bench. Brown insists that due to eye-strain and fatigue from working on a time clock with many small pieces, and from irritation to his eyes due to the spray he was using with his work, he had pushed his chair back from his work bench to clear

his head and rest his eyes, but that he was not sleeeping.

Secondly, even if the grievant did lose consciousness briefly, the company overreacted. In that department, it was not unusual for someone to stop work for a few minutes to rest, even close his eyes, without being disciplined. All that might be anticipated from a supervisor would be a tap on the back and a mild admonishment to get back to work. But even if Brown had gone fully to sleep, a discharge as a penalty constituted widely **disparate treatment**. There has been only one sleeping incident involving discipline, and that employee, Mickey Litchford, was given a suspension.

Whatever position is taken regarding the extent to which Brown was asleep, the severity of the punishment given him appears to be evidence to support Brown's claim that the supervisor came down hard on him because of personal dislike and because he had challenged

a number of Company actions by filing grievances.

ISSUE

Whether the grievant was discharged for cause under the terms of the Collective Bargaining Agreement.

DISCUSSION

On March 14, 1993, grievant Gerald J. Brown was discharged for sleeping on the job. The company contend's that Terry Coleman, the grievant's supervisor, observed him asleep at his work bench, and that Coleman's conclusion was confirmed by lead man David Keever. The grievant nevertheless maintains that he was not asleep, that he was "just resting his eyes."

Was Brown Asleep At His Work Bench?

Terry Coleman, the Electronic and Instrument ("ENI")Superintendent, testified that he walked into the shop about 3:30 P.M. and saw the grievant sleeping in his chair in front of his bench. Colenan said that he

walked within five feet of the grievant, stood there and saw his head bob three or four times as if asleep. Having determined for himself that Brown was sleeping, Coleman felt that he needed a witness to corroborate his observations; so, he motioned David Keever to come over. Coleman said that the two of them got within three feet of Brown, could see that his eyes were closed and his hands were in his lap, empty. According to Coleman, Keever shrugged his shoulders as if to say, "yeah, he's sleeping," and then returned to his work station. Coleman testified that Brown awoke when Arnold Wright entered the room and banged some equipment on the door frame, and that when asked if he had "had a good sleep", Brown denied that he had been asleep.

In its effort to substantiate its case against Brown, the Company obtained a statement from Keever shortly after the incident. When the statement was not as

detailed as the Company would have liked, Keever was asked to provide a second statement. Neither corroborated Coleman's version precisely. At the hearing,Keever, a naturally reluctant witness, testified that he couldn't tell whether Brown's eyes closed, or whether he "was out of it", because he was wearing a ball cap and glasses. "He could have been daydreaming". Keever conceded, though, that he got within two or three feet of Brown and Brown did not react. He also did not contest that the grievant remained more or less in the same position for the several minutes that he was being observed by both him and Coleman.

Brown testified that he definitely had not been asleep, that he could not recall all of the details specifically, but that he had been working with a time clock with many small parts. He speculated that his eyes had been tired, and that he had just

been resting them.

Not even Brown disputes that he was slumped in his chair virtually motionless for a period of three to five minutes, not withstanding that two people came to within three f et of him and stood there looking at them f Brown had not been asleep, I can see reason why he would not have acknowledged the approach of either, or both of these men. If he was playing "possum", perhaps the performance that he gave was too good. But the conclusion that Brown was asleep does not result in an automatic dismissal of the grievance. The Company's action in response to the violation of a work rule is subject to the requirement of the parties' collective Bargaining Unit that discharge must be for cause. I take this to mean just cause.

Was Discharge A Permissible Penalty Under The Collective Bargaining Agreement? The Union argues that the discharge was an

improper punishment, first because the severity is greatly disproportionate to the misconduct. Second, it points out, even for the generally serious category of sleeping, the penalty was not consistent with the punishment meted out previously.

Is Sleeping A Capital Offense? The Company contends that sleeping on the job is universally considered to be among the most serious breaches of plant rules. Going from the general to the specific, it points out that because of the opportunity for coming in contact with live electricity, going to sleep while working in the Bridgestone Plant constitutes a serious safety violation also. I agree with the Company's contention that sleeping is generally considered to be among the most serious breaches of the rules of industrial conduct. There is a seemingly unlimited number of arbitration decisions which

uphold discharges for first-time sleeping offenses. (Some arbitrators reason that sleeping is much the same as stealing from the Employer).

A review of the reported decisions where discharge has been the penalty for sleeping reveals a common thread running through many of them. The link is the intentionality of the sleeping employee--his purposefulness in carrying out the act. Often, he has made plans and hidden himself away in a closet,furnace room or little-travelled area of the plant. However, the grievant was in an open room, fully subject to view and discovery(as the facts bear out). There is no suggestion that Brown's going to sleep was contemplated in advance, planned, or anything other than spontaneous.

Although it may be possible to differentiate among various acts of sleeping on the job, and possible too to conclude under the

facts that the grievant was substantially less culpable than an employee who, for example, was found sleeping in the cab of an unused crane, determining that Brown's act could have been more egregious does not mean necessarily that his discharge was without cause. The Company has retained the right under its Management Rights clause, to make reasonable rules and to provide reasonable penalties for the enforcement of those rules. The Company insists that under the Contract, it is permitted to establish, and has established, a rule that all incidents of sleeping, however short, and whether committed in the open, or in secret, planned, or spontaneous, are prohibited and that all violators will be discharged upon their first offense. Such a rule, properly published and consistently applied, would appear to meet the requirements of the Collective Bargaining Agreement.

The final inquiry is to determine whether these standards were met.

If The Rule Which The Company Set Was That All Employees Found Asleep Will Be Discharged, Was The Notice Of The Rule And Its Accompanying Punishment Adequate?

On November 20, 1992, what was the understanding between the Company and the Bargaining Unit regarding what constituted the prohibited act of sleeping on the job? Did an employee have to be prone with a pillow under his head, or was a moment's loss of consciousness sufficient to put his job at risk? There is no written rule. Couple this omission with the fact that in the relatively young Management-Union relationship, there has been but one example of discipline for sleeping. [1] So, there is practically no help to define the boundaries of the rule against sleeping.

[1 And this example(the Litchford incident) is obscured by a settlement agreement.]

Nevertheless, both parties argue that the Mickey Litchford incident supports their respective contentions. Litchford was discharged after two supervisors reported that they had observed him sleeping. Thereafter, a Union official negotiated his return (according to the Union, by convincing management that the evidence against Lichford was not sufficient to support a finding of sleeping and a discharge). Because Litchford was reinstated without backpay, the Union's interpretation is that Litchford was given a suspension. The Company insists that it discharged Litchford for sleeping and that bringing him back to work without backpay was a compromise, but not a suspension. I agree. However the details of Litchford's alleged sleeping were not disclosed at the hearing. Therefore, the incident is not useful to compare with Brown.

I do not challenge the Company's state-

ment that it has not used suspension as a method of disciplining its employees. But the issue is not whether the Company considered suspension an option. Rather, it is whether Brown had notice or reason to believe that he would be terminated if he fell asleep in his chair at his work bench. If he and other employees did have reason to believe this, then the all-inclusive rule is due to be enforced. However, if it was not reasonable for them to conclude that they would be terminated the first time that they dropped off to sleep at their work benches, the rule lacked adequate publication, or consistent enforcement. I find credence in the testimony of the Union that Management had an occasion given no more than a mild verbal admonishment to employees in this department who for a brief period were observed to be sitting at their work tables with their eyes closed, or not working. To the

extent these incidents have occurred, employees are given cause to believe that they will not be terminated for similar behavior. Managers must be allowed discretion in enforcing rules and applying penalties, but when the discretion encompasses virtually ignoring the offense[2], on one end, and terminating the employee, on the other, the required consistency of enforcement is absent. With no express admonition that all incidents of sleeping will be dealt with by discharge, and with incidents of employees "resting" or not working for brief periods at their work stations being treated lightly, I find that the severity of the punishment for dropping off to sleep at the work bench could not have been anticipated by any employee in the department. This lack of notice of the harsh consequences invali-

[2] [A mild verbal reproof that does not even get into the employee's personnel record.]

dates the discharge.Nevertheless, the grievant was not blameless and is due a reasonable penalty. He will forfeit back pay.

Notwithstanding this finding that the discharge was without sufficient cause, I find no evidence whatsoever that the punishment was rendered because of discrimination--either racial or Union. The record contains such charges made by the grievant, but after all of the testimony, the charges are unproven, bare allegations.

AWARD

The discharge of Gerald J. Brown is reversed. He is to be returned to work as soon as practicable, without back pay.

"s/James J. Odom,Jr. ".

James J. Odom,Jr.,Arbitrator
Birmingham, Alabama
August 9, 1993

UNITED STATES CODE TITLE 42

Section 1981. EQUAL RIGHTS UNDER THE LAW

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

UNITED STATES CODE TITLE 42

SECTION 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceding for redress.